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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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8 IN RE: TFT-LCD (FLAT PANEL) ANTITRUST  
9 LITIGATION

No. M 07-1827 SI

MDL No. 1827

10 This Order Relates to:

11 ALL CASES  
12

**STATEMENT OF REASONING  
INVOLVED IN COURT'S ORDER OF  
FEBRUARY 11, 2010**

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14 The Court issued an order, filed under seal, on February 11, 2010. The Government objects to  
15 a request made by certain defendants to unseal that order. The Government asserts that unsealing the  
16 order would violate Rule 6(e)(6) of the Federal Rules of Criminal Procedure, which governs grand jury  
17 proceedings. The Government adds, however, that “the Court is fully aware of its legal reasoning and  
18 is at liberty to draw upon and even share its reasoning in the context of the civil dispute.” The Court  
19 does so here.

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21 **BACKGROUND**

22 Shortly after the civil cases were transferred to this district for multidistrict proceedings, the  
23 Department of Justice sought to intervene in the MDL for the purpose of seeking to limit discovery in  
24 the civil actions. By order filed July 10, 2007, the Court permitted the DOJ to intervene. The DOJ then  
25 moved to stay civil discovery on two grounds. First, the DOJ asserted that because civil discovery is  
26 broader than criminal discovery, there was the risk that parties in the civil action would be able to  
27 discover sensitive information about the grand jury investigation through civil discovery. Second, the  
28 DOJ argued that if civil discovery proceeded in tandem with the grand jury proceedings, employees of

1 the companies under investigation could be placed in the untenable position of having to choose between  
2 asserting their Fifth Amendment right against self-incrimination in a civil deposition, with the negative  
3 inference that comes with that decision, or testifying in a civil deposition and running the risk of  
4 self-incrimination in the criminal matter. The Court granted the DOJ's motion to stay discovery until  
5 May 2008, but permitted certain limited categories of non-grand jury discovery to proceed. The stay  
6 order permitted the DOJ to review but not copy all discovery produced by a party. Docket No. 306 in  
7 M 07-1827 SI. In May 2008, the stay order was revised to permit certification discovery.

8 The parties in the MDL negotiated a protective order to preserve the confidentiality of the  
9 documents produced pursuant to civil discovery. The December 10, 2007 stipulated protective order  
10 provides that the parties may use civil discovery materials "only in connection with this [civil] action  
11 for prosecuting, defending, or attempting to settle this action." In 2009, the DOJ sought to modify the  
12 September 2007 stay order to allow the DOJ to copy, and not just review, all documents produced in  
13 the MDL. The Court initially granted the motion, but in response to concerns raised by defendants,  
14 referred the parties to the Special Master to explore modifications to the discovery plan. After briefing  
15 and a hearing, the Special Master recommended that DOJ be permitted to review all civil discovery, but  
16 prohibited from making any copies of the overseas discovery, including deposition transcripts, of the  
17 unindicted defendants. The Special Master found that the DOJ's request for all civil discovery would  
18 expand the DOJ's subpoena power beyond its current geographical limits. The Special Master stated  
19 that "[t]he critical issue is whether allowing the DOJ to have copies of foreign discovery brought into  
20 the United States under court order does indeed grant to the United States foreign discovery that would  
21 otherwise be outside the grand jury's subpoena power," and she noted that the foreign defendants had  
22 "vociferously argued against producing either their documents or their employees into this country  
23 during this entire litigation." Report & Recommendation Re: Toshiba Entities' Motion for  
24 Modifications to the Discovery Schedule and Plan at 2:25-26 (emphasis added). The Special Master  
25 found that "those defendants are still guaranteed certain protections regarding criminal proceedings and  
26 those protections must be safe-guarded, so that the government does not overstep its power, intentionally  
27 or otherwise." *Id.* at 3. The Special Master was also concerned that any criminal indictments that  
28 flowed from the grand jury's review of overseas documents produced in the civil matter could be subject

1 to challenge. This Court adopted the Special Master's R & R in an order filed October 20, 2009. That  
2 order provided that "the United States shall be limited to reviewing access only, without the right to  
3 copy foreign documents and deposition transcripts of foreign national employees of the Toshiba Entities  
4 and AUO, as well as the other non-indicted foreign defendant (such as . . . Hannstar Display  
5 Corporation)."


### 7 DISCUSSION

8 The central question considered in the February 11, 2010 order was whether a grand jury may  
9 subpoena foreign-based documents that would otherwise be outside the geographic scope of its  
10 subpoena power, but that are located in the United States by virtue of the civil discovery in a related  
11 MDL proceeding. The documents in question might otherwise be obtained by (1) letters rogatory, (2)  
12 requests made under executive agreements or treaties, such as mutual legal assistance treaties, and (3)  
13 informal means.

14 The Court considered *In Re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62  
15 F.3d 1222 (9th Cir. 1995), to determine whether the grand jury might have the authority to subpoena  
16 such foreign documents. In *Meserve*, the Ninth Circuit established a *per se* rule that protective orders  
17 cannot shield discovery from grand jury subpoenas, and the court held that a criminal grand jury could  
18 subpoena documents that were subject to a protective order in a closed civil case. *Id.* at 1226. While  
19 there is broad language in *Meserve* regarding the power of the grand jury, *Meserve* did not address the  
20 grand jury's authority to subpoena foreign evidence that would otherwise be outside its subpoena power,  
21 or the interplay between criminal grand jury proceedings and ongoing civil proceedings involving  
22 unindicted foreign defendants. It often happens that civil cases are filed on the heels of an  
23 announcement about a criminal grand jury investigation, and related foreign-based evidence and  
24 depositions may be present in the United States solely because of the civil discovery. Ordinarily a grand  
25 jury would be required to obtain foreign material through letters rogatory or other methods. The Court  
26 did not find precedent in the case law, and was dubious about establishing such precedent, to permit  
27 grand juries to obtain foreign discovery for criminal grand jury proceedings when that evidence is  
28 present in the United States only as a result of related civil actions.

1 The Court felt it possible that such actions might ultimately jeopardize the criminal proceedings.  
2 The Court therefore found it is prudent allow the appellate process to establish such precedent if  
3 appropriate.

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6 Dated: March 29, 2010

  
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SUSAN ILLSTON  
United States District Judge